

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

APPEAL UNDER SECTION 109 No 16 of 1993

For Approval and Signature:

Hon'ble MR.JUSTICE R.BALIA.

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1. Whether Reporters of Local Papers may be allowed to see the judgements? Yes
2. To be referred to the Reporter or not? Yes
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?
3 to 5 No

MAMATA INDUSTRIES

Versus

SHANTI DHOOP KARYALAYA

Appearance:

MR RR SHAH for Petitioner
PARTY-IN-PERSON for Respondent No. 1
NOTICE SERVED for Respondent No. 2

CORAM : MR.JUSTICE R.BALIA.

Date of decision: 25/06/98

ORAL JUDGEMENT

1. This appeal is filed against the order of the Assistant Registrar dated 2nd February, 1993 by which the application of the appellant has been refused registration.

2. Heard Mr. Shah learned counsel for the appellant. No one appears for respondents in spite of

service and case being on board since 15.6.98.

3. The appellant is a firm carrying on business of manufacturing and marketing the incense sticks . It is doing the business since many years and applied for the registration of trade mark containing a device in the form of a monogram. In the outer circle, on the top of it, Mamta Industries was inscribed and at the bottom words `three buds, was inscribed in English. In the centre of monograph, design of three buds was depicted. All the words in monograph are in English. The commodity in respect of which the mark was sought to be registered in the name of appellant is `agarbatti, or incense sticks. The application was made on March 3, 1986. The applicant claimed its user since 27th January, 1986. The application was registered at S.No. 450425 in class-3 and was advertised before acceptance under proviso to Section 20(1) of the Act of 1958.

3. In response to the advertisement, the respondent filed Notice of opposition on 16th December, 1988. The respondent M/s Shanti Dhoop Karyalaya is having its principal place of business at Delhi. The opposition rested on the ground that opponents were the registered proprietors of trade marks consisting of the words "DO KALIYAN " (Two Buds) and in respect of Agarbatti & Dhoop under Nos. 268261 and 294182 respectively in classification No. 3. In respect of incense sticks, it was advertised in Trade Marks Journal dated 1.5.1974 and is valid up-to-date. Likewise, the similar mark was registered under trade mark No. 294182 in class 3 in respect of incense (dhoop) which was advertised in the Trade Marks Journal No. 647 dated 16.5.1976 and is valid up-to-date. The label was also registered under Copy Rights Act on 10th March, 1970.

4. While the Assistant Registrar did not agree with the opponent's contentions about the user of Mamta Industries in violation of Section-9 of the Act, he agreed with the objection of the Opponent under Sec. 12(1) by reasoning that opponents have secured a good reputation and good will in respect of mark owned by them and registration of the impugned marks is likely to cause deception and confusion in the minds of the purchasers. The trade marks of the opponent in English means two buds on the the other hand the applicant's mark is in English having three buds. The rival labels have to be compared as a whole, existence of two different languages on the label cannot take away the fact of deceptive similarity between the two marks if they convey the same meaning. Analogy was drawn from the

illustration that the picture of one elephant with the word 'elephant, will definitely be deceptively similar to a label consisting of the picture of two elephants.

5. For consideration of the deceptive similarity, one well settled principle is to consider that the person who is ultimate buyer is seldom going to have opportunity to compare the two competing marks placed side by side to have a discerning examination to make his choice, and also that an average buyer has an imperfect recollection of details. He does not retain in his mind every detail of a mark which he has seen. More often than not he will have only a general recollection of what the nature of trade mark is. Test of deceptive similarity in this backdrop is whether in view of his general recollection of the trade mark, a buyer is likely to be deceived or confused to think that the trade mark before him is same of which he has recollection and not whether if the person is looking at two marks side by side, there would be a possibility of confusion. It has been stated that the true test is whether the proposed mark is such which is likely to cause deception or confusion on the minds of persons accustomed to the trade mark. It is also to be remembered that the trade mark is essentially a visual device though the ascertainment of an essential feature is not to be by ocular test alone. The significance of words and consideration of sound cannot be excluded in considering a claim of rival owners of the marks in dispute. It is also well known principle while comparing a device or marks for the purpose of registration to consider, what are its distinguishing or essential features which are likely to stick in the mind of the consumer having imperfect reflection of details. In each case, application of this principle depend upon partly on courts own judgment, partly on the burden of evidence adduced before it.

6. In the present case, after considering the two rival devices, I am of the opinion that neither there is visual similarity nor any phonetic similarity, which is likely to cause deception amongst the prospective buyers. In the first place it may be noticed that while the respondent opponent has claimed that he is the registered proprietor of trade mark Do Kaliyan (two buds), the mark which has been advertised for the purpose of securing registration and in respect of which the opponent has been granted registration, the words 'two buds' in English language does not find place anywhere in the mark owned by the opponent. The device adapted by the opponent which is rectangular in shape, the brand name

`DO KALIYAN AGARBATTI' to appear both in Devnagri Scripts, the Hindi and English name written in Roman script. Words two buds in neither case finds place in registration or on the label, which has been registered as trade mark in the name of opponent. No evidence has been shown that the opponent has been using the English translation of the words 'Do Kaliyan' also in its dispensation of goods, to convey its meaning in English Language. In totality, the mark of which the respondent is a registered owner, the words two buds as English translation of the numeral 'Do' and word 'kaliyan' do not constitute any part of the trade mark owned and used by the respondent much less can be said to be essential feature of the trade mark owned by the respondent. As against this, as noticed above, while the trade mark owned by the respondent is in the form of a label, the trade mark sought to be registered by the appellant is in the form of a Round monogram. It neither uses word in Hindi Language or Devangri script nor does it uses the Roman script for writing words KALIYAN in English. The pedantic view propounded by the learned Assistant Registrar that user of different language is of no relevance where the picture depicted is the same does not command itself, without noticing the attending circumstances and considering whether the words, device, photograph or the view of the entire device as a whole with its distinctive feature renders the impugned mark so similar to the mind of an average buyer that he is likely to be deceived or confused to consider one for another or distinguishes it from the rival mark. Firstly, he has failed to consider that for a person or a purchaser used to buy goods with reference to a mark in the form of label with no monogram over it which is not likely to deceive by user of a monogram by others. It has no visual resemblance. It may also be noticed that while the mark owned by the respondent which is in the form of rectangular label on a coloured background depicting two small branches of plant with leaves and buds on the right bottom corner and left middle top the word 'AGARBATTI' is written in Roman script. The essential feature in the form of a round monogram like device sought to be registered by the appellant has no coloured background nor depicts any branch of plants is also not likely to create any confusion or deception in the minds of people. The monogram carrying the words 'Three Buds, in English alone one is not likely to confuse the product with the appellant's product of the respondents, which does not have any monogram like projection in any form. There cannot be any phonetic similarity between the words used in Hindi and the words used in English. In the present case, as the respondent is not at all using the English

meaning of the words 'DO KALIYAN', the common man in the country like India who are the users of incense sticks, it cannot be assumed that by user of English translation of words 'Kaliyan' one could be confused with other. In the facts and circumstances, I am of the opinion that the monogram format is essential feature of the mark of the applicant and design of the monogram with picture in the middle nowhere come near similarity to opponent's mark to be treated as deceptively similar. Also to be noticed is that in the advertisement what has been stated about the respondent's mark. When its application reads the marks which was sought to be registered 'Do Kaliyan' meaning "Two Buds" one of the trading styles and address of the applicant and descriptive matter which also go to show that what was intended to be distinguishing and essential features of the respondent mark were words "Do Kaliyan" and not the entire label with details of design whereas in the case of applicants mark distinctly the monograph itself with a sapling like projection in its centre, leaves impression in the mind and not the words 'three buds'. The impugned mark does not create an impression of deceptive similarity in the form taken as a whole or in its essential features in comparison to rival work.

7. The two rival marks do not offer any visual or phonetic similarity to cause deception or confusion in the mind of an average buyer of one goods for another. The illustration of similarity of one elephant and two elephants shown on two rival marks, relied on by learned Assistant Registrar is wholly inapt in the facts of the present case. Thus in my opinion, the conclusion of the learned Assistant Registrar against the appellant under Sec. 12(1) cannot be sustained.

8. Like wise, it has been categorically stated by the learned counsel for the appellant that he has restricted, in the alternative, prayer for grant of registration in its favour only in respect of State of Gujarat which has not been considered at all, particularly when notwithstanding claim made by the respondent neither any evidence has been led nor any finding has been reached that the respondent opponent has acquired a reputation and goodwill in respect of its trade mark or he has any business which could result in securing any reputation and goodwill about its market within the state of Gujarat so as not warrant even consideration of the request of the appellant for restrictive use of trade mark only within the state of Gujarat. This complaint also appears to be justified. The Assistant Registrar ought to have considered the

prayer of the respondent appellant for granting registration only in the State of Gujarat, if uninhibited grant of registration was not acceptable to him; after making due inquiry before rejecting the plea.

9. As a result this Appeal is allowed and order under appeal is set aside. The Registrar is directed to proceed with the application in accordance with law. There shall be no order as to costs.

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